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In the Matter of	)	
	)	
Adjustment of the Rates for	)	Docket No. 96-6
Noncommercial Educational	)	CARP NCBRA
Broadcasting Compulsory License	)	

PUBLIC BROADCASTERS' PETITION TO MODIFY  
THE DETERMINATION OF THE  
COPYRIGHT ARBITRATION ROYALTY PANEL

INTRODUCTION

Pursuant to 37 C.F.R. § 251.55(a), the Public Broadcasting Service ("PBS"), National Public Radio ("NPR"), and the stations on whose behalf they seek rates in this proceeding (the "Public Broadcasters") hereby request a modification of the Panel's determination of the compulsory royalty rates to be paid by the Public Broadcasters to the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") under Section 118 of the Copyright Act of 1976, 17 U.S.C § 101 et seq. See Report of the Panel, In the Matter of Adjustment of the Rates For Noncommercial Educational Broadcasting Compulsory License, Docket No 96-6 CARP NCBRA at 25-28 (1998) (hereinafter the "Report").

In the Public Broadcasters' estimation, the Panel did a commendable job in sifting through a voluminous

hearing record and attempting to arrive at "reasonable" license fees payable to ASCAP and BMI for the 1998-2002 period. There is no one unassailable methodology to govern a rate-setting proceeding such as this, and as a general matter the Panel properly assessed what it perceived to be the strengths and weaknesses of the respective parties' trial positions.

The Panel nonetheless committed one legal error of significance concerning its formulation of the "reasonableness" inquiry governing its deliberations. The Panel concluded that that inquiry is aimed at determining the value of the rights involved in a "hypothetical free market, in the absence of the Section 118 compulsory license." Report at 9-10. That error, coupled with several factual conclusions unsupported by the weight of the evidence, led the Panel to give unduly limited weight to the Public Broadcasters' fee-setting methodology, predicated on twenty years of prior agreements expressly reached under the auspices of § 118, and thereby to set a fee -- \$27.512 million payable to ASCAP and BMI combined over a five-year period -- in excess of the "reasonable" value of the § 118 licenses at issue.<sup>1</sup>

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1. Full copies of the Public Broadcasters' Proposed Findings of Fact and Conclusions of Law (hereinafter "PB (continued...))

These limited, but consequential, errors led the Panel to engage in the following, anomalous reasoning:

1. The Panel agreed with the Public Broadcasters that "the most obvious and direct approach" to fee-setting entails using the license agreements previously negotiated between the parties as a benchmark and adjusting that benchmark for changed economic and music use circumstances. Report at 17.
2. The Panel factually concluded that the parties' prior agreements, reached seven separate times over twenty years, were voluntary, freely-negotiated, and arm's length transactions. Report at 20.
3. The Panel factually concluded that, since those agreements were last negotiated (in 1991), the Public Broadcasters' use of ASCAP and BMI music has not increased. Report at 32.
4. The Panel determined that the most relevant measurement of changed economic circumstances is the change in public broadcasting revenues. Report at 27. The record demonstrates that, between 1992 and 1996, those revenues grew solely by some 13 percent. PB PFFCL at ¶ 105.
5. Notwithstanding the foregoing undisputed findings, the Panel concluded that ASCAP and BMI were entitled to more than a 44 percent increase in fees above the prior negotiated levels -- based on the erroneous premise that the prior agreements reflected "voluntary subsidies" of public broadcasting by ASCAP and BMI and that the Panel was required to look elsewhere for a starting benchmark. See Report at 20-23.

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1. (...continued)  
PFFCL") and Proposed Reply Findings of Fact and Conclusions of Law (hereinafter "PB RFFCL") are attached for reference as Appendix A to this Petition. The fee methodology and underlying data presented by the Public Broadcasters in support of their rate request are summarized at PB PFFCL at ¶¶ 54-147.

Public Broadcasters respectfully submit that the Librarian should modify so much of the Panel's Report as fails to give due weight to the prior agreements reached between the parties, and the fee implications of adjusting the fee levels of the most recent such agreements to account for changed circumstances since they were negotiated. The economic impact of this error is significant: the Public Broadcasters' methodology yields reasonable combined ASCAP and BMI fees for the 1998-2002 period totalling some \$21 million, whereas the Report calls for fees some 30 percent higher. Public Broadcasters hereby request that the Librarian adjust downward the fees awarded to ASCAP and BMI to correct for the Panel's error.

THE PUBLIC BROADCASTERS' PROPOSED RATE METHODOLOGY

For their approach to the rate-setting determination, the Public Broadcasters looked to previous license fee agreements negotiated between them and ASCAP and BMI, respectively, over a twenty-year period. There have been seven such agreements. See PB PFFCL at ¶¶ 75-79. As set forth more fully in their Proposed Findings of Fact (see ¶¶ 57-68), the Public Broadcasters proceeded from this starting point based upon the fundamental economic principle that arm's length agreements voluntarily entered into between the parties themselves are presumptively the best

measure of the value of the goods or services involved. This proposition is basic to economics; has been a cornerstone of analogous ASCAP "rate court" jurisprudence; and, as we discuss in further detail below, undergirds § 118 itself. See generally PB PFFCL at ¶¶ 12-21.

To be sure, a reasonable fee determination of the type here involved requires more than merely endorsing the parties' prior agreements with further examination. It is, of course, necessary to examine changed circumstances in determining the continued reasonableness of prior negotiated fee levels, and the Public Broadcasters' proposed methodology entailed doing so. See PB PFFCL at ¶¶ 63-68.

During the hearings in this matter, all parties agreed that one relevant measure of changed circumstance entails changes in the Public Broadcasters' use of ASCAP and BMI music. Id. In addition, various measures of changed economic circumstance were identified by the parties and the Panel. Those principally identified were changes over time in the Public Broadcasters' programming expenditures, as well as in their revenues. Id.

Much evidence was adduced on the subjects of music use and economic performance measures. The Public Broadcasters demonstrated that, since the negotiations for the 1993-1997 license period, (i) overall music use by

Public Broadcasters has been constant to declining (see PB PFFCL at ¶¶ 106-146) and (ii) programming expenditures -- which the Public Broadcasters regard as the optimal measure of changed economic circumstance as it bears on the music valuation issue here at hand -- increased by 7.2 percent. PB PFFCL at ¶¶ 91-95. (At the Panel's urging, the Public Broadcasters also analyzed changes in their total revenues over that same time period, which, depending upon the specific years used as end points for calculation, increased between 11 and 13 percent.) PB PFFCL at ¶¶ 99-105.

Utilizing the foregoing approach and data as the basis for fee-setting, the Public Broadcasters recommended as reasonable combined ASCAP and BMI fees for 1998-2002 the sum of \$20.2 million -- which results from an adjustment of the base royalty fee of \$18.875 million, the bargained-over sum agreed to be paid to ASCAP and BMI over the last five-year license period, by the 7.2 percent increase in programming expenditures experienced thereafter. (Since overall music use did not increase, no further adjustment with respect to that factor was necessary.) In the alternative, adjusting for changes on revenues would have yielded a reasonable fee in the range of \$21.0 to \$21.3 million. See PB PFFCL at ¶¶ 147, 165.

While the Public Broadcasters' methodology used combined 1993-1997 ASCAP/BMI fees as a benchmark, the soundness of that methodology was independently corroborated by reference to either of the ASCAP or BMI fees for that period standing on their own. This was the case because the fees paid to each of ASCAP and BMI were in direct proportion to the parties' estimates of their respective music shares. As a result, a review of the actual license fees paid to each society reveals that they paid virtually identical dollars per percentage point of music use. See PB PFFCL at ¶¶ 196-198; Report at 31-34.

In its Report, the Panel agreed that the Public Broadcasters employed "the most obvious and direct approach" for calculating license fees by starting with the prior agreements and adjusting for changed circumstances. Report at 17. The Panel further found that the prior agreements had the fundamental indicia of reasonableness insofar as they were "voluntary, freely negotiated, and arm's length transactions. . ." Report at 20. Respecting changed circumstance, the Panel adopted the Public Broadcasters' conclusion that overall music usage has not increased in recent years (Report at 32) and determined that changes in total public broadcasting revenues constitute the optimal measure of changed economic circumstance. Report at 27.

Finally, the Panel confirmed that the prior license agreements separately negotiated with ASCAP and BMI "closely approximate their relative shares of music." Report at 20, n.33.

Notwithstanding the foregoing, the Panel, for the reasons we discuss below, declined to give any probative weight to the prior license agreements as potential fee benchmarks, concluding that they represented "voluntary subsidies" of public broadcasting by ASCAP and BMI. The methodology instead employed by the Panel resulted in rates some 30 percent higher than those which would have resulted from application of the Public Broadcasters' methodology.

#### ARGUMENT

A. The Panel Misapprehended The Governing "Reasonableness" Inquiry

The Panel correctly noted that its task was to set "reasonable" terms and rates for the ASCAP and BMI compulsory licenses to which the Public Broadcasters are entitled under § 118. Report at 8. The Panel also correctly noted that while § 118 does not define the term "reasonable," the legislative history of the Act indicates that the Panel must set a rate which reflects the "fair market value" of the rights being licensed. Report at 8-9; PB PFFCL at ¶¶ 12-16.



It was in assessing the meaning of "fair market value" for these purposes that the Panel committed a fundamental error. It assumed, incorrectly, that the fact that this proceeding takes place in the particularized context of § 118 is irrelevant to the fee determination process, and that, instead, the core inquiry entails a determination of what the "Public Broadcasters would pay to ASCAP and to BMI for the purchase of their blanket licenses for the current statutory period, in a hypothetical free market, in the absence of the Section 118 compulsory license." Report at 9-10 (emphasis added). Analyzing the parties' twenty years of prior agreements from this legally incorrect premise, the Panel rejected those agreements as a benchmark for fee setting here based on its conclusion that "ASCAP and BMI would not have acceded to these rates within the context of a truly free market -- in the absence of the Section 118 compulsory license." Report at 20. Accord Report at 22 ("...ASCAP would not today, in the absence of the compulsory license, agree to rates based upon the current agreement); id. ("...in the absence of the Section 118 compulsory license, the 1992-1997 rate would not serve as a benchmark for current hypothetical negotiations") (emphasis in original).

The Librarian has previously made clear that, in undertaking its "reasonableness" determination, a rate-adjustment panel must take into account the purposes sought to be served by § 118. See PB PFFCL at ¶ 17. As all parties to this case agree, § 118 requires that the panel balance the interests of copyright owners and public broadcasters so that the rates established "assure a fair return to copyright owners without unfairly burdening public broadcasters." H.R. Rep. No. 94-1476 at 118 (1976); PB PFFCL at ¶ 18; Baumgarten, Tr. at 499.

Consistent with this recognition, the Librarian has noted that "reasonable rates and terms are not synonymous with marketplace rates" and that, accordingly, "a statutory rate need not mirror a freely negotiated marketplace rate -- and rarely does -- because it is a mechanism whereby Congress implements policy considerations which are not normally part of the calculus of a marketplace rate." Final Rule and Order, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25,394, 25,399, 25,409 (1998) (emphasis added) (hereinafter "DSTRA Order").

Rather than diminish the weight to be accorded prior agreements reached under its auspices, § 118

specifically invites rate-setting panels to consider them in establishing a reasonable fee. Section 118(b)(3) thus prescribes that "the [Panel] may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in paragraph (2)." Section 118(b)(2), in pertinent part, references "license agreements voluntarily negotiated at any time between one or more copyright holders and one or more public broadcasting entities" in lieu of invocation of the CARP (or previously CRT) process. See Report at n.28; Baumgarten, Tr. at 486-491; PB PFFCL at ¶¶ 20-21. Notably, such prior agreements are the only indicia of reasonable fees specifically enumerated in § 118. While the Public Broadcasters do not assert that this Panel was thereby constrained from examining other potentially relevant data, its outright rejection of those agreements as potential -- indeed, as the presumptively most logical -- benchmarks for fee-setting was clearly contrary to the dictates of § 118 of the Act.

The import of §§ 118(b)(2) and (3) for the fee-setting inquiry has been specifically noted by the Librarian, who has recognized that agreements reached between parties subject to § 118 compulsory licensing result in "a reasonable rate which inevitably affords fair compensation to all parties." DSTRA Order at 25,409 (citing

to § 118(b)) (emphasis added). This is eminently logical. Parties subject to § 118 ratemaking, in the give-and-take of negotiations, can be expected to take into account the likely outcomes of CARP proceedings in determining the fees to which they will agree. The "inevitable" outcome of such dealings is a "reasonable" fee within the meaning of § 118. PB PFFCL at ¶ 19.

Operating from the premise that the fees historically agreed to between the parties were lower than those which would have been arrived at in a hypothetical "free" market, the Panel concluded that those fees thereby must have represented "voluntary subsidies" of public broadcasting by ASCAP and BMI. In turn, such subsidized fees, the Panel reasoned, were invalid guideposts for reasonable fees for future periods. The "no precedent" and "confidentiality" clauses inserted in those agreements at ASCAP's and BMI's urging (discussed further below) were relatedly regarded by the Panel as a means of protecting ASCAP and BMI from later claims that the rates agreed to were "free-market" approximating.

But it is only by assuming that the objective of this proceeding is to construct a hypothetical free market fee outside of the policy prescriptives of § 118 that the Panel could have reached these conclusions. The Public

Broadcasters respectfully submit that to conclude that the rates contained in the prior voluntary agreements were not "reasonable" because ASCAP and BMI would not have agreed to them in the absence of § 118 is beside the point. As the structure of § 118(b)(2) and (3) contemplate, the most relevant, and most presumptively reasonable, agreements for the Panel's consideration are those expressly reached, not in a hypothetical "free marketplace," but under the auspices of § 118. Indeed, the latter such agreements "inevitably afford[] fair compensation to all parties." DSTR Order at 25,409.

By affording no weight whatsoever to the prior agreements between the Public Broadcasters and ASCAP and BMI, the Panel disregarded the most probative evidence of reasonable fees, which led the Panel to establish fee levels higher than warranted.

B. The Panel's Analysis of The No Precedent and Confidentiality Provisions of The Prior Agreements Reflects its Flawed Legal Reasoning

The principal basis on which the Panel concluded that the prior agreements between the Public Broadcasters and ASCAP and BMI reflect "voluntary subsidies" which would not have been granted outside the scope of § 118, thereby rendering them of no import here, is the supposed intent

underlying certain contractual provisions inserted in these agreements at the behest of ASCAP and BMI.

1. The ASCAP No Precedent Clause.

The Panel concluded that an ambiguous provision appearing in three prior ASCAP agreements which stated that the terms agreed to were to be non-precedential deprived those agreements of economic significance to the fee-setting process. In particular, the Panel, relying almost exclusively on the testimony of Hal David, concluded that the no-precedent clause was evidence that "ASCAP would not today, in the absence of a compulsory license, agree to rates based on the prior agreement." Report at 22 (emphasis added). However, as discussed above, the fact that ASCAP might not have agreed to the fees it did in the absence of § 118 is not a proper basis for rejecting the prior agreement as a benchmark for ongoing § 118 fee-setting. Rather, the proper inquiry in this case involves arriving at "reasonable" rates which approximate what a willing buyer and willing seller could be expected to agree to within the framework of § 118. Viewed from this standpoint, the Panel's conclusion that ASCAP, in a hypothetical "free market," might not have agreed to similar rates, is not relevant. The fact remains that ASCAP and the Public Broadcasters reached voluntary agreement under the auspices

of § 118 in circumstances in which ASCAP, if it truly believed it was not receiving "reasonable" value, was free, and certainly had the economic wherewithal, to commence a fee-setting proceeding. See PB PFFCL at ¶¶ 204-209. That it elected not to do so is virtually conclusive of the reasonableness of the agreements it repeatedly reached with the Public Broadcasters. Id.<sup>2</sup>

2. The BMI Confidentiality Clause.

The Panel engaged in a similar -- albeit even more conclusory -- analysis respecting a clause in the prior BMI agreements which required that the fee being paid by the

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2. The Panel's reliance on Mr. David's testimony that ASCAP may have believed it was entitled to more than it received as evidence that ASCAP "voluntarily subsidized" the Public Broadcasters is also questionable based on the record evidence. Contracts are formed only by a "meeting of the minds," and here there is no evidence that the Public Broadcasters in any sense shared ASCAP's viewpoint that the Public Broadcasters were paying other than the true value of the rights they bargained for. See PB RFFCL at ¶¶ 48-58. Indeed, Paula Jameson, PBS' former General Counsel, who, unlike Mr. David, directly participated in the 1987 and 1992 negotiations, testified that (i) there was no substantive discussion of the relevant aspects of the no precedent clause in connection with the 1987 and 1992 negotiations, (ii) that PBS viewed these provisions as immaterial boilerplate, and (iii) that the resulting fees were viewed by all sides as fair and reasonable. Id.

Given that the Panel did not otherwise regard ASCAP's rationales for limiting the weight to be given the prior agreements as of great moment, see Report at 20-21, the Panel's determination to give the views of one witness from one side of the negotiations without knowledge of the background facts dispositive weight in interpreting these agreements was, we submit, arbitrary.

Public Broadcasters "be kept strictly confidential by the Parties and that its terms shall not be voluntarily revealed to any person [including the CRT]. . ." Report at 22. Without analysis, the Panel concluded that this provision assertedly had similar import from BMI's perspective, i.e., that it evidenced BMI's agreement to voluntarily subsidize the Public Broadcasters.

In so concluding, the Panel again mixed analytic apples and oranges, since the issue here is not what BMI thought it might obtain in a hypothetical free market, but instead what it was entitled to under § 118. The undisputed record as to this latter issue is that BMI for twenty years voluntarily agreed to license terms without resort to CRT or CARP intervention, even as it was litigating with many other users -- large and small -- in fora throughout the United States. See PB PFFCL at ¶¶ 75-78, 86-89.

The Panel's reasoning as to BMI is erroneous for additional reasons. Its construction of the clause at issue is at odds with the plain text of that clause, which is devoid of any language suggesting that the underlying fee was not indicative of fair market value. PB RFFCL at ¶¶ 59-64. In fact, the clause is a standard form of non-disclosure, common to many commercial agreements, which specifies only that the parties keep the fee and music use



information confidential. Id. Indeed, the language clearly contemplates that the agreement might ultimately be produced as a result of compulsory process and contains no provision -- which BMI certainly could have sought -- addressing the evidentiary weight to be given to the agreement in such circumstances.

The Panel, in addition, pointed to the Public Broadcasters' asserted failure to offer a plausible explanation for the non-disclosure clause other than the interpretation supplied by the Panel. See Report at 23. The Panel mistakenly overlooked clear record evidence providing just such an explanation.

Marvin Berenson, the BMI witness who testified concerning this provision, acknowledged that, up until the most recent failed round of negotiations, BMI's "market share," i.e., the use of its repertory by the Public Broadcasters in relation to ASCAP, was embarrassingly low -- some 20 percent versus ASCAP's 80 percent. Berenson, Tr. at 2426-2428. During direct examination, Mr. Berenson offered what is the logical explanation for BMI's need for confidential treatment of the agreements: "Basically, we did not want this to become public at that time, that we had a 20 percent share of the music performance. We were not proud of it." Berenson, Tr. at 3401. On cross-examination,

Mr. Berenson confirmed that this concern was a "significant factor" in BMI's insistence on inclusion of the provision. Berenson, Tr. at 3425-3428.<sup>3</sup>

For the foregoing reasons, the Panel's interpretations of the ASCAP and BMI contract provisions in issue are both legally irrelevant and factually unsupported by the record. It was, therefore, error for the Panel to rely upon these clauses as a basis for rejecting the prior agreements as a proper benchmark.

C. The Magnitude of The Fee Disparity From Commercial Broadcasting As Evidence of "Voluntary Subsidization"

As further evidence that ASCAP and BMI have been unilaterally subsidizing public broadcasting, the Panel cited the magnitude of the fee disparity which has existed between public and commercial broadcasting. The record makes plain, however, that the fact that the Public

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3. The Panel also ignored undisputed evidence concerning BMI's assessment of the fair value of its repertory to the Public Broadcasters during negotiations over the license covering the 1993-1997 period. The record reveals that BMI's unsolicited, opening offer in 1992 was for a fee of \$821,000 per year. See PB30X. The parties eventually agreed upon a rate of \$785,000 per year -- less than 5% below the level BMI initially proposed. See PB PFFCL at ¶¶ 213-220. As the Public Broadcasters' expert economist observed: "Presumably a party going into a negotiation does not make an initial offer that they perceive to be below the true value. If anything, you make your first offer a little above what you think fair market value is in the course of negotiations." PB PFFCL at ¶ 215.

Broadcasters have historically paid royalties lower than those of commercial broadcasters (measured on a percentage of revenue basis) simply is not evidence that the agreed-upon payment levels represent a "voluntary subsidy." The Public Broadcasters' unanswered economic testimony on this point established that it is axiomatic that different users will value similar goods and services differently and that different entities can and do negotiate different rates for the same or similar commodities. PB PFFCL at ¶¶ 180-181. Indeed, this premise was elsewhere embraced by the Panel, which found "significant differences" in the salient economic circumstances of commercial and non-commercial broadcasters. Report at 24.

The Panel also gave undue weight to the testimony of one composer witness in drawing the conclusion that public broadcasters pay rates competitive with commercial broadcasters for other inputs -- such as composers' "up front fees." Report at 23. For one, the record reflects a complex interrelationship between "up front" and "back end" fees which precludes drawing economic inferences as to one from the practice as to another. See generally Owen, Tr. 1490-1500; Jaffe, Tr. at 3637-40. For another, the one composer, Mr. Bacon, testified that he has received "roughly" the same synchronization rights fees from both the

commercial and non-commercial sectors, but was never asked his familiarity with industry practice overall in this regard. Bacon, Tr. at 1613-1614, 1636. There was thus little, if any, basis for the Panel to draw broad conclusions from this snippet of limited testimony.<sup>4</sup>

D. Proper Consideration of the Prior Agreements  
Between The Parties Dictates That The Librarian  
Make a Downward Adjustment To The Fees

As described above, a combination of legal and factual errors led the Panel incorrectly to reject the prior agreements between the parties as the presumptively most logical benchmark for fee-setting. Even recognizing that the Panel was entitled to examine various data as part of its inquiry, it is clear that the prior marketplace experience -- as reflected in prior voluntary agreements -- is a directly relevant point of reference for fee-setting purposes. This is especially true in this case, where seven voluntary agreements were freely negotiated over a twenty-year period.

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4. In reaching its conclusion from Mr. Bacon's testimony, the Panel appears not to have considered this same witness' concession that he has long been aware of a large disparity in the performance royalties he receives from public as opposed to commercial broadcasters, but nonetheless chooses to continue to provide his services to the Public Broadcasters. This testimony is inconsistent with the conclusion that the disparity in rates was indicative of a subsidy. See generally PB PFFCL at ¶¶ 180-182. Jaffe, Written Dir. at 19.

Instead, the Panel's chosen fee methodology completely excludes this twenty-year history as a point of reference. It adjusts forward instead from the CRT's 1978 ASCAP fee determination based on changes in public broadcasting revenues since 1978. Report at 24-27. The effect of the Panel's methodology is to hold constant the percentage of revenue paid by the Public Broadcasters to ASCAP over time.

In the absence of additional, intervening indicia as to reasonable rates, such an approach might be justifiable. However, the presence here of a series of far more contemporary agreements should have further informed the Panel's determination. In particular, the Panel should have given substantial consideration to the fact that the post-1978 negotiations between the parties yielded rates below the effective percentage of revenue outcome of the 1978 CRT proceeding. Rather than being anomalous or evidence of a "subsidy," this post-1978 fee experience is in line with ASCAP's own more recent experience in the commercial sector, which, according to ASCAP's own data, has seen ASCAP's television license fees decline significantly as a percentage of broadcast revenues -- from 0.83 percent as of 1978 to 0.44 percent as of today. Boyle, Tr. at 1889-90, 1931.

Had the Panel recognized the validity of the prior agreements as starting points for analysis, and adjusted them based on the data credited by the Panel showing that (i) music use by the Public Broadcasters is unchanged since the last agreements were entered into<sup>5</sup> and (ii) revenues as calculated by CPB grew between 1992 and 1996 solely by some 13 percent over the prior license term,<sup>6</sup> it would have arrived at a reasonable fee of \$21.3 million (to be divided between ASCAP and BMI), rather than the significantly greater sum of \$27.512 million it instead found to be reasonable.<sup>7</sup> We respectfully submit that fees in the \$21 million range more closely approximate those that are reasonable for the 1998-2002 period and that downward adjustment of the Panel's fee outcome is warranted.

#### CONCLUSION

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5. See report at 32 ("we accept Public Broadcasters' conclusion that overall music usage has remained constant in recent years"); see also PB PFFCL at ¶¶ 65-66.

6. PB PFFCL at ¶ 105.

7. While the Public Broadcasters are indifferent as to how the total license fees are distributed between ASCAP and BMI, it should be noted that an application of the Panel's methodology -- which would divide the total fee based upon the ASCAP and BMI's respective music shares -- would yield a total fee for the 1998-2002 license term of \$12.8 million to ASCAP (based upon a 60% share) and \$8.5 million to BMI (based upon a 40% share). See Report at 31-34.

For the foregoing reasons, the Librarian should modify the Panel's July 22 determination by adjusting the total royalty rate payable by the Public Broadcasters to ASCAP and BMI for the 1998-2002 license period downward based upon a proper consideration of the prior agreements reached between the parties.

Respectfully submitted,



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